

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

John Cosby,

Plaintiff,

Hon. Hugh B. Scott

04CV941A

v.

**Order
and
Report & Recommendation**

Superintendent James Conway, et al.,

Defendants.

The defendants have filed a motion to dismiss several of the claims in this case (Docket No. 2). In addition to his response to the motion (Docket No. 10), the plaintiff has filed an Amended Complaint. (Docket No. 9). Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's pleadings "once as a matter of course at any time before a responsive pleading is served." In the context of Rule 15(a), the law is settled that a motion to dismiss is not deemed a responsive pleading. See Leone v. Creighton, 1995 WL 151771 at *1 (E.D.N.Y. 1995)(collecting cases); Porter v. Greiner, 2005 WL 3344828 at *9 (E.D.N.Y.,2005).

The Amended Complaint includes additional factual allegations and addresses some of the arguments raised by the defendants in the motion to dismiss. For example, the defendants sought to dismiss the First, Fifth and Seventh causes of action of the original Complaint, which

assert conspiracies under 42 U.S.C. §1985, on the grounds that the plaintiff has not properly pled that such conspiracies were motivated by racially discriminatory animus as required under that provision. The plaintiff does not dispute that his conspiracy claim cannot be brought in this case under §1985. (Docket No. 10 at page 8). Instead, the plaintiff asserts that he has amended the complaint to re-assert these claims under §1983.

In light of the filing of the Amended Complaint, it is recommended that the motion to dismiss the original Complaint (Docket No. 2) be denied without prejudice as moot. The defendants are directed to answer or otherwise respond to the Amended Complaint within 20 days of the date of this Order.

So Ordered.

/s/ Hugh B. Scott

United States Magistrate Judge
Western District of New York

Buffalo, New York
February 2, 2006